Supreme Court, U. S.
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MICHAEL RODAK, JR., CL

73-1663

IN THE

Supreme Court of the United States

JUNE TERM, 1974

No. 73-2761

MICHAEL GARDNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Undersigned Counsel, on behalf of Petitioner, MICHAEL GARDNER, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case entered on April 5, 1974.

Opinion Below

The Court of Appeals affirmed the judgment of the United States District Court, without opinion. A copy of the Order of the Court of Appeals is attached as Exhibit "A".

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and Rule 37(b) of the Federal Rules of Criminal Procedure.

Questions Presented

1. WHETHER THE GUILTY VERDICT BELOW SHOULD HAVE BEEN REVERSED DUE TO A FATAL PREJUDICIAL VARIANCE BETWEEN THE INDICTMENT WHICH ALLEGED A SINGLE CONSPIRACY AND THE PROOF AT TRIAL OF MULTIPLE SEPARATE CONSPIRACIES, IN VIEW OF *KOTTEAKAS* v. *UNITED STATES*, 328 U.S. 750 (1946).

2. WHETHER THE GUILTY VERDICT BELOW SHOULD HAVE BEEN REVERSED DUE TO A PREJUDICIAL MISJOINDER NOT AUTHORIZED BY RULE 8(b) AS A RESULT OF JOINING IN ONE INDICTMENT A PERJURY COUNT AGAINST ONE DEFENDANT THAT WAS TOTALLY UNRELATED TO THE CHARGES IN THAT INDICTMENT AGAINST THE PETITIONER.

3. WHETHER THE INDICTMENT SHOULD HAVE BEEN DISMISSED AGAINST THE PETITIONER AS SELECTIVE PROSECUTION IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Constitutional Provisions Involved

Amendment V, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice

put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Statement of the Case

Petitioner Gardner was indicted in six counts of a twenty-nine count indictment which charged the Petitioner along with ten others of stock fraud in violation of Title 15, United States Code, Section 78j (b) and Rule 10b (5) of the Securities and Exchange Commission and conspiracy to commit stock fraud in violation of Title 18 United States Code, Section 371.

The indictment charged twenty-six substantive counts of stock manipulation, one count of conspiracy to manipulate and two counts of perjury. The Petitioner was named in five substantive counts (22-26) and the conspiracy count.

The Petitioner was tried together with the defendants Leonard Kozman, Anthony Sano and Anthony Soldano. The defendant, Anthony Sano, was not charged in the conspiracy count. The defendant, Leonard Kozman, was charged in a Perjury Count in addition to the conspiracy and substantive counts. The defendant, Anthony Soldano, was charged in both the conspiracy and substantive counts.

Prior to the selection of the jury, upon motion of the government, the Court severed twelve substantive counts including counts 24, 25 and 26 in which Petitioner was named. Thus, the Petitioner was tried on two substantive counts (22 and 23) and the Conspiracy count, No. 27.

Prior to trial, the Petitioner moved for severance alleging a misjoinder pursuant to Rule 8 (b) of the Federal Rules

of Criminal Procedure because of the joinder in one indictment of the Perjury count against defendant, Kozman, with the conspiracy and substantive counts against the Petitioner. The Petitioner also moved for severance pursuant to Rule 14 of the Federal Rules of Criminal Procedure. A motion was also made to dismiss the indictment as discriminatory against the Petitioner. The Court dismissed all of said motions.

The trial proceeded as to the Petitioner, Gardner, Leonard Kozman, Anthony Sano and Anthony Soldano. At the conclusion of all the evidence the Petitioner moved to dismiss the conspiracy and substantive counts. The basis of Petitioner's motion to dismiss the substantive counts was a variance between the proof, indictment and bill of particulars and because the evidence was insufficient as a matter of law with respect to the offense charged in the substantive counts. The Petitioner also moved for a mistrial as the government proved multiple separate and distinct conspiracies rather than the one conspiracy alleged in the indictment. Also, the Petitioner again moved for a mistrial because of the joinder of the perjury count against defendant, Leonard Kozman, with the counts against Petitioner. All Petitioner's motions were denied.

After Petitioner's closing argument during which Petitioner strongly argued that the Government had failed to prove mailing of the confirmations of purchase described in counts Nos. 22 and 23, Judge Bauman dismissed said substantive counts because of the Government's failure to prove use of the United States mail.

On October 12, 1973, the jury rendered its verdict finding Petitioner Gardner guilty on Count No. 27, the conspiracy count. Anthony Sano was convicted of seven substantive counts of stock fraud and Leonard Kozman was convicted

of three substantive counts of stock fraud and of conspiracy. He was found not guilty of perjury. Anthony Soldano was found not guilty of conspiracy.

On December 10, 1973, Petitioner Gardner was sentenced by Judge Bauman to one year and one day in prison.

With Respect to the First Point Above:

Count 27 of the Indictment charged Petitioner Gardner and nine other defendants with conspiracy to violate the securities laws in the offer and sale of Vendotronics stock.

The Indictment alleges that the conspiracy commenced on or about the 1st day of January, 1969 and continued thereafter up to and including the date of the filing of the indictment.

Paragraph 9 of the conspiracy count states:

> "The allegations contained in paragraphs 3 (a) through 3 (o) of counts one through twenty-six of this Indictment are repeated and realleged as though fully set forth herein, as constituting and describing the means by which said defendants committed the offense charged in paragraph 1 of this count".

As there is not any paragraph "1" in the conspiracy count, the Grand Jury must have been referring to paragraph "6" of the Indictment which is the first paragraph in the conspiracy count.

Paragraph 3 states that "Among the means which the defendants would and did use to carry out the offense charged in paragraph 1 were the following:

"(b) Fred Goodman would and did pay the defendant ANTHONY SANO sums of money during 1969 in order

to induce him to recommend Vendotronics stock to various registered representatives at various brokerage firms and other customers of his for the purpose of creating and maintaining an artificially high price for the stock.

"(c) The defendant, ANTHONY SANO, would and did undertake efforts to induce registered representatives employed at various brokerage firms and others to purchase and recommend the purchase of Vendotronics stock."

Subparagraphs (a) and (d) through (o) inclusive have not been set forth herein as they each name an individual defendant who was charged in the conspiracy count.

When Judge Bauman read the Indictment to the jury at the beginning of the trial he read subparagraphs (b) and (c) of paragraph 3 as part of the conspiracy count. When charging the jury after trial, Judge Bauman amended the Indictment by deleting subparagraphs (b) and (c) of paragraph 3 from the conspiracy count. The reason for the deletion was that the Grand Jury did not name ANTHONY SANO in the conspiracy count although it did name him and refer to his acts in paragraph 3, subparagraphs (b) and (c) which were incorporated by reference into count 27, the conspiracy count.

The first overt acts alleged in the conspiracy count commence in November, 1969. However, paragraph 3 subparagraphs (a) through (o) is meaningless unless it has been incorporated as a list of additional overt acts. In any event the inclusion of subparagraph 3 into the conspiracy count caused confusion and permitted the Government to create a momentum of conspiracy by introducing the evidence against Sano which evidence clearly proved a con-

spiracy among Goodman and Kazdin at the hub and Sano as a spoke.

In effect, although the theory of the Indictment would seem to be that the conspiracy commenced in the fall of 1969 and continued through the summer of 1970, the incorporation of paragraph 3 (b) and (c) into the conspiracy count creates substantial ambiguity in this regard. The proof at trial was dramatically different. The Government evidence offered against Sano proved that a conspiracy existed between Kazdin, Goodman and Sano. This conspiracy was formed in January, 1969. Goodman used Kazdin money to pay Sano $2,500 to induce Sano to obtain buying in Vendotronics to create a market so that Vendotronics could possibly obtain financing.

Again, in February or early March, 1969, Goodman met with Sano and paid him $10,000 to obtain additional purchasing of Vendotronics stock so that the price of the stock would rise to $6.00 per share so that Vendotronics could obtain a loan on its stock from the Bank of Nova Scotia in the Bahamas. This $10,000 came from Kazdin and Harry Sugar, a stockholder in "National Research", the company that merged with Vendotronics.

Finally, the Government offered evidence to prove that Sano and Goodman entered into a conspiratorial agreement in August and September, 1969 whereby Sano purchased 7,000 shares of Vendotronics for himself and Goodman and after manipulating the market to cause the price of the stock to rise, sold the stock for a substantial profit which he split with Goodman. Thus, the Government offered evidence of conspiracy and manipulation which created a momentum of conspiracy which washed over and engulfed the defendants named in the conspiracy count without ever naming Sano in that count. The defendants named in the

conspiracy count had to overcome the evidence of conspiracy against Sano, Goodman and Kazdin although for purposes of the indictment that evidence was not offered against them. The specter of conspiracy and manipulation was raised without having to offer any evidence against defendants named in the conspiracy count. The Government attempted to have the evidence concerning the conspiracy between Goodman and Sano relative to the 7,000 shares of Vendotronics introduced against all of the defendants as being admissible in furtherance of the conspiracy alleged in count 27. When this failed, it was offered against Soldano in relation to the conspiracy count. The Petitioner, Gardner, again raised the issue of multiple conspiracies. Finally the evidence was introduced solely against Sano but the effect of the evidence was the same as if it had been introduced against all of the defendants in furtherance of the conspiracy.

Commencing in October, 1969, in order to raise the price of Vendotronics to $8.00 per share for a potential Secondary Offering by First William Street Securities, Goodman solicited and paid brokers, including Kozman, DiBenedetto and Feiffer, to induce their customers to purchase Vendotronics. The goal or object was to raise money for Vendotronics. The money paid to the brokers was obtained by Goodman from Kazdin. The payments to DiBenedetto and Feiffer continued to March, 1970.

Then in April, 1970, Goodman decided to sell his 40,000 shares of Vendotronics to pay off a debt to Soldano. His intent was not to cause the market price of Vendotronics to rise or to obtain financing for Vendotronics. It was simply to sell his stock in the open market. In order to do this he conspired with Riesse and Gardner to create a shortage of Vendotronics stock through buying in the United States, which shortage Goodman intended to fill

with his stock. When this plan failed Goodman formulated another scheme without Gardner but with Hesse, Louis Kaye and Levine to create a shortage in Canada. This plan also failed.

The foregoing does not set forth one continuing conspiracy but several distinct, separate conspiracies with different objectives.

With Respect to the Second Point Above:

Count 29 of the Indictment charged Leonard Kozman with committing perjury before the Grand Jury investigating the Vendotronics transactions on June 19, 1972 in violation of Title 18, United States Code, Section 1623. This count was joined with the conspiracy and substantive counts of the Indictment concerning the manipulation of Vendotronics.

Prior to trial the Petitioner, Gardner, moved for a severance upon the grounds that the joinder was not authorized by Rule 8 (b) of the Federal Rules of Criminal Procedure and for a severance pursuant to Rule 14 of the Federal Rules of Criminal Procedure as the defendant would be prejudiced by the joinder. The motion was denied. Again, during the trial the Petitioner, Gardner, objected to the introduction into evidence by way of a re-enactment of the Grand Jury appearance of Kozman of Kozman's entire Grand Jury testimony. This motion was also denied.

The perjury count did not arise out of the same transaction as the other counts in the Indictment. It is completely independent. The violation of Title 18 United States Code Section 1623 was not in furtherance of the conspiracy.

With Respect to the Third Point Above:

Prior to the trial the Petitioner, Gardner, moved to dismiss the indictment as discriminatory against him so as to constitute a denial of due proces of law as guaranteed by the Fifth Amendment to the United States Constitution.

The Petitioner was indicted along with ten others. There were thirty other alleged co-conspirators who were not indicted. Among those not indicted was Fred Goodman, who was the moving force and central figure in the alleged conspiracy.

The Petitioner alleged that he was indicted because the Government was not satisfied with his testimony as a Government witness in the case of *United States* v. *Albert*, which case was tried in the United States District Court, Southern District of New York. It was the Petitioner's position that he should have been given and was denied the same opportunity to avoid prosecution as Fred Goodman and the other unindicted co-conspirators. The Government failed to give any reason for the Petitioner's indictment except for its prosecutorial discretion. The Petitioner took the position that the Government had a burden to prove that its discretion was not based upon an arbitrary classification established by the Government and that it failed to meet this burden, this resulting in a denial of due process of law as to the Petitioner.

Reasons for Granting the Writ

As to Point No. 1

The Supreme Court stated in *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946):

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the errone-

ous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand".

The facts in this case set forth a classic wheel conspiracy. The various "spokes" were not dependent on one another in order to achieve the purpose of the conspiracy. Without interdependence, there was no reason to impute knowledge of the existence of any "spoke" by any other spoke. Without this, a "wheel" conspiracy in actually separate, distinct independent conspiracies between the "hub" and each "spoke" unless, by the nature of the particular conspiracy, such knowledge could be inferred. However, the nature of the conspiracy alleged in the indictment was not such that knowledge could reasonably be presumed.

Due process as to the Petitioner required for a conviction that the evidence be strong enough to exclude every other reasonable hypothesis, other than the guilt of the Petitioner of the precise conspiracy charged. It is not sufficient to convict the Petitioner upon proof that he was engaged with any other of the defendants in a separate conspiracy of the general nature of the conspiracy charged, though not shown to be guilty of the particular conspiracy charged. *Kotteakas*, supra.

As to Point No. 2

The joinder of Count 29, the perjury count against the co-defendant, Kozman was not authorized under Rule 8 (b) of the Federal Rules of Criminal Procedure.

The resulting joinder was prejudicial to the Petitioner and amounted to a denial of Due Process.

The joinder of the perjury count against Kozman with the other counts in the Indictment would have been proper only if the acts in furtherance of the conspiracy count and other substantive counts were of a similar character to the acts of actual perjury and were connected together or were constituting parts of a common scheme or plan. Such is not the case in this Indictment. *United States* v. *Bonanno*, 177 F. Supp. 106 (D.C.N.Y. 1959), *United States* v. *Cohen*, 230 F. Supp. 589 (D.C.N.Y. 1964), *United States* v. *Haim*, 218 F. Supp. 922 (D.C.N.Y. 1963).

As to Point No. 3

Prior to trial the appellant, Gardner, moved to dismiss the Indictment as so discriminatory to him as to constitute a denial of due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

It was Gardner's position that he was indicted in this case because the Government was dissatisfied with his testimony as a Government witness in the case of *United States* v. *Albert*, a case that was tried in the United States District Court, Southern District of New York.

The pretrial motion is a part of the record on appeal. Gardner has been discriminated against as he was indicted while Fred Goodman and twenty-nine other alleged co-conspirators were not indicted.

Discrimination by the Government in its enforcement of the law violates the Fifth Amendment and constitutes a denial of due process. *United States* v. *Cobbart*, 441 F (2) 1261. Selective prosecution based upon any arbitrary classification established by the Government is a denial of due

process to those defendants selected for indictment. *United States* v. *Steele*, 461 F (2) 1148.

Prosecutorial discretion must be rationally related to the purpose of the statute that has been violated and must be exercised in the public interest and welfare. *United States* v. *Sacco*, 428 F (2) 264.

It is obvious that some classification was established other than participation in the crime charged in the Indictment. Not every unindicted co-conspirator was a Government witness. Some of these co-conspirators were more deeply involved in the conspiracy than Gardner. For example, Harry Sugar made a $5,000 payment to manipulate Vendotronics and was a stockholder in Vendotronics. He was not a Government witness nor was he indicted. Portney was not indicted but he and his firm, First William Street Securities, were involved in the manipulation for a longer period of time than any co-conspirator other than Goodman and Kazdin.

Gardner offered sufficient proof of selective prosecution to shift the burden to the Government to show some basis for its selection. The Government did not offer any reason for its selection except "Prosecutorial discretion". This was insufficient under the circumstances and the Indictment should have been dismissed.

CONCLUSION

The Petition for Writ of Certiorari should be granted and this Court should thereafter reverse the judgment of the Court of Appeals.

Morton Berger
54 Durham Road
White Plains, New York 10607
Attorney for Petitioner

Certificate of Service

I Hereby Certify That a true copy of the above has been furnished to the United States Attorney, Southern District of New York, by U.S. Mail, this 5th day of May, 1974.

Morton Berger

Certificate of Service

I Hereby Certify That a true copy of the above has been furnished to the Solicitor General, Department of Justice, Washington, D.C. 20530.

Morton Berger

Exhibit "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of April one thousand nine hundred and seventy-four.

Present:

HON. PAUL R. HAYS,

HON. JAMES L. OAKES,

Circuit Judges,

HON. A. SHERMAN CHRISTENSEN,

District Judge.

73-2771 73-2761 73-2840

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY SOLDANO, ANTHONY SANO, RONALD KAZDIN, MURRAY LEVINE, ANTHONY DIBENEDETTO, STEVEN J. FEIFFER, LEONARD KOZMAN, FRED HESSE, LOUIS KAYE AND JAMES MORSE, MICHAEL GARDNER,

Defendants.

ANTHONY SANO, MICHAEL GARDNER,

Defendants-Appellants.

Exhibit "A"

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed as to the appellant Michael Gardner.

It is further ordered, adjudged and decreed that the judgment as to appellant Anthony Sano be and it hereby is affirmed as to Counts 1, 4, 8 and 9 but as to Counts 5 and 7 said judgment be and it hereby is reversed.

A. Daniel Fusaro,
Clerk

By /s/ Vincent A. Carlen
Chief Deputy Clerk